United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-2370

IN THE UNITED STATES

COURT OF APPEALS FOR THE SECOND CIRCUIT

GERARD and GEMMA BRAULT

v.

TOWN OF MILTON

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT
OF VERMONT
FOR EN BANC CONSIDERATION

REPLY BRIEF FOR APPELLANTS

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GENERAL OBSERVATION ON APPELLEE'S BRIEF

The English author, Lewis Carroll, described well what Appellant would have expected from Appellee; "The time has come, the walrus said, to speak of many things...".* We would have anticipated the Appellee, and the amicus City of New York, to have spoken of the historical development of constitutional causes of action dealt with on pages 2 through the top of page 4 of Appellant's Brief. We would have expected an analysis or attempt to distinguish the multiple cases extending Bivens** to other amendments, including the 14th, spoken of on pages 4 and 5 of Appellant's Brief. We would have expected a scathing attack or distinguishing analysis of the issue creation discussion on page 5 of Appellant's Brief. We would have expected rejection of the case rationale for 28 U.S.C. §1331(a) jurisdiction appearing on pages 6 and 7 of Appellant's Brief.

None of this was forthcoming. It can only be, therefore, conceded to be legally accurate and historically sound.

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* Dodgson, Charles. Through The Looking Glass, PP. 205.

** Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971).

ARGUMENT 1

A Bivens CAUSE OF ACTION APPLIES TO 14th AMENDMENT DUE PROCESS.

Appellee has chosen to argue in regard to the Bivens cause of action:

A. Bivens is restricted and does not apply to municipalities (Appellee's Brief, page 2); and

B. The Appellant could have sought a Federal remedy earlier (Appellee's Brief, pages 2 and 3); and

C. The facts of the case would not make out a due process violation at trial (Appellee's Brief, pages 4 through 7).

Perhaps we can most expeditiously deal with each of these arguments in order:

A. If Appellee had distinguished, dismissed, or denied the multiple cases extending Bivens cited on pages 4 and 5 of Appellant's Brief, this claim would be more persuasive. Its persuasiveness is further diluted by the decision in Dahl v. Palo Alto, 372 Fed. Supp. 647 (D.C. Cal. 1974), and Stephens v. Plano, 375 Fed. Supp. 985 (D.C. Tex. 1974), both finding Bivens-type causes of action with §1331 jurisdiction against municipalities under the 14th Amendment for zoning problems.

While not specifically a zoning problem, a 14th Amendment cause of action with §1331 jurisdiction has also been found in United Farm Workers v. Del Ray Beach, 493 Fed. 2d. 799 (CA 5, 1974). Most recently, within this circuit, a department of

the City of New York was found subject to 8th Amendment applications of a Bivens cause of action with jurisdiction founded on 28 U.S. §1331. Waltenberg v. New York City Department of Corrections, 376 Fed. Supp. 41 (D.C. NY 1974).

It was not surprising that it should be argued that municipalities are unique since that analysis was anticipated and dealt with at the bottom of page 6 and the top of page 7 of the Appellant's original brief. There has, as yet, been no attack on the Appellant's original analysis or the cases cited in that portion of Appellant's Brief.

Appellee rather raises the question (Appellee's Brief, page 2), "Does a municipality seeking an injunction have a far greater capacity for harm than an individual civil litigant?" The answer, of course, is in the quotation from Bivens at page 392, which appears just above the question quoted in Appellee's Brief. Yes, a municipality, like the state of which it is a subdivision, has "authority other than his [its] own." It speaks with the voice of government; in Vermont with the sanction of statute, 24 VSA 3024.

B. Perhaps the most interesting argument of Appellee's Brief, is that there was an earlier Federal remedy by way of injunctive relief available to Appellant. After the municipality sued, it is contended such would have abolished the need for seeking of damages in this action.

At the outset, we might point out that Dombroski v. Pfister, 380 U.S. 479 (1965) relied upon by Appellee has been diluted substantially by Perez v. Ledesma, 401 U.S. 66 (1970),

and Younger v. Harris, 401 U.S. 3, (1970)

To seriously argue in view of Samuels v. Mackel, 401 U.S. 66, and Younger, supra. as interpreted in Steffel v. Thompson, 415 U.S. 452, (1974), and Allee v. Medrano, 416 U.S. 802, (1974) that with action pending in state court, injunctive civil rights relief was available to Appellant and then later argue that principles of Comity and Federalism require rejection, at this time, of the cause of action for damages presents an intellectual inconsistency and logical anomaly that cannot be overlooked in weighing the merit of Appellee's arguments.

The suggestion that threshold injunctive access to the Federal court at the outset of this litigation was available to the Defendant, now Appellants, would seem to fly directly in the face of 28 U.S.C. §2283. There was clearly not, at that time, irreparable injury (Douglas v. Jeanette, 319 U.S. 157) sufficient to cause a short circuiting of state judicial proceedings. Appellant assumes that Appellee does not suggest that a Federal district court could, by mandatory injunction, direct state judicial proceedings (see Gately v. Sutton, 310 F. 2d. 107) (CA10). To suggest the invocation of Federal jurisdiction on the facts existing at the time the Town originally brought its state court action, is to suggest a distortion of Federalism, McNeill v. Tarumianz , 242 F.2d. 191, (CA 3). To argue that a Federal claim existed at the threshold of the litigation, and prior to the state adjudication that the

zoning ordinance was invalid is to ignore the necessity for a Plaintiff to have a Federal issue when he seeks jurisdiction of a Federal court.

Sound appellate policy requires that this court not pass judgment on the merits when confronted with an appeal from a juristictional dismissal (New Orleans v. Warner, 180 U.S. 199). Further, Appellee assumes that due process comes only in a procedural garment. It has been long recognized that due process wears a substantive robe as well.* It is not at this posture of this case for this court to decide whether, after remand, the Plaintiffs can prove this claim. That is for another court on another day.

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* 1 Antieau Modern Constitutional Law, §§5:103-5:119.

ARGUMENT 2

THE EFFECT OF 42 U.S. CODE 1983 UPON CONSTITUTIONALLY-BASED CAUSES OF ACTIONS AGAINST MUNICIPALITIES.

Without, in any way, denying the analysis or historical perspective in Appellant's Brief pages 7 through 9, the Appellee asserts that a Bivens cause of action cannot be extended to a municipality because 42 U.S. Code §1983 does not extend to municipalities. It is of interest to note that in the three pages of Appellee's Brief devoted to this subject (pages 8 through 11 inclusive) there is no mention of the opinion of the Supreme Court in Bruno v. City of Kenosha, 412 U.S. 507 (1973).* The only time the Supreme Court has clearly dealt with 28 U.S.C. §1331(a) jurisdiction over municipalities there was no definitive decision that would undermine the position advanced by the Appellant. The Appellee's argument chooses to overlook the force in this area of the concurring opinion of Justice Brennan.**

The Appellee, rather, argues that Congress must solely be vested with authority to implement the 14th Amendment. In its analysis, the Appellee chooses to totally avoid the argument

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* It is of more than passing interest that the Appellee's Brief dealing with the jurisdiction of Federal courts over municipalities under §1331 does not even list in its table of cited cases the only United States Sup eme Court decision which deals squarely with this issue and remands the matter for determination of jurisdictional amount.

** Cited on page 6 of Appellant's Brief.

advanced on payes 7 through 9 of Appellant's Brief that the adoption of 28 U.S. Code §1331 is precisely such a Congressional implementation. Further, it chooses to overlook, or concede by lack of denial, the argument developed on page 5 of Appellant's Brief that the courts are empowered, and long have, implemented remedies for Federal rights.

In sum, the most serious defect in the portion of Appellee's Brief which deals with the interrelationship of 42 U.S. Code §1983 and Bivens causes of action under 28 U.S. Code §1331 is its total failure to deal with the holding and language of the Supreme Court. The holding of the majority in that case presupposes a cause of action and jurisdiction and asserts only the need to establish a jurisdictional amount on remand. In the face of this prior clear judicial adoption of the theory of Appellant, the argument of Appellee may be historically interesting as summarizing ancient positions but is hardly responsive to the thrust of the current arguments presented.

ARGUMENT 3

THE DOCTRINE OF CLAIM PRECLUSION AS APPLIED TO THIS CASE

In its argument on claim preclusion, the Appellee once again ignores the general principles and specific applications advanced by the Appellant, except for an extensive suggestion that the Appellant has misread or misapplied the State Supreme Court decision (see Appellee's Brief page 16 and following). It is unseemly at this late point to become embroiled in a line by line analysis of state court precedent. The Appellant has never conceded that the Lombard* decision was in error because it did not apply state court precedent (see Appellant's Brief page 13). However, it may be well to review the most recent statement of the Vermont Supreme Court on this subject in detail. In the case of Hill v. Grandey, 132 VT 460, (1974), the court articulates clearly the state position on this subject:

> "This Court has characterized the doctrine of res judicata as rendering a former judgment an absolute bar to a subsequent action only where the parties, subject matter and the causes of action are identical, or substantially so. McKee v. Martin, 119 Vt. 177, 122 A.2d 868 (1958)... For res judicata purposes, the cause of action is the same if the same evidence will support the action in both instances... Whether the same cause of action is present, so as to raise the bar of res judicata to subsequent litigation, must be determined on the facts of each case."**

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* Lombard v. Board of Education, 502 F.2d. 631 (CA 2, 1974)

** Hill v. Grandey, supra., 463-464.

In summarizing its position, the court, after finding the two causes of action not inconsistent, concludes:

> "While not inconsistent, however, they are not identical... ...the evidence required to support either one of the two actions would not support the other action. While the cause of action here raised might have been raised in the original proceedings, to have done so would have expanded the questions to be passed upon and the evidence to be considered. Such matters are best left to the discretion of the parties and the trial court, lest the proceedings become too unwieldy. Se V.R.C.P. 13. We therefore now hold that the present action is not barred by res judicata."

The Appellee also argues that the question here presented of a Constitutional tort was available for state review. It is seriously doubted that the state court would have entertained a position and theory on which a Federal district court dismissed the complaint for failure of such a cause of action and this court's own Panel divided on the subject. Further, it cannot be seriously believed that a state court should be left to decide the applicability of such defenses as "good faith" in this new area of Constitutional tort when it has most recently been the subject of Supreme Court decision in the much older and well-settled area of §1983 jurisdiction. Wood v. Strickland, ___ U.S. ___, 42 LW 4293 (1975).

As part of its further "shot gun" approach to the preclusion issue, Appellee has suggested that, after the conclusion of the State Supreme Court appeal, the Appellant here should have

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* Hill v. Grandey supra., 464-465.

brought a §1983 action and enforced their injunctive claim by pendent jurisdiction. To so argue, of course, is to assume that one may not exercise options but must do what one could do. It is further to assume that pendent jurisdiction is a doctrine of the Plaintiff's right, not of the court's discretion. The clear weight of decided precedent indicates that such is not the case and that pendent jurisdiction need not be exercised each time that it is found to exist. United Mine Workers v. Gibbs, 303 U.S. 715. It is the better rule, that when it appears that there are two separate claims, one presenting a Federal question and the other not, a Federal court is without jurisdiction to entertain the non-Federal claim regardless of purported joinder. Hurm v. Oursler, 289 U.S. 238; see also annotation 5 ALR 3d. 1068 §10(a). It is, therefore, far from certain, and highly speculative at this point, in this proceeding, to suggest other alternatives which might have invoked Federal jurisdiction.

In pursuing the preclusion argument, the Appellee seems to suggest that while §1983 "certainly provides a cause of action independent of any state remedy" (Appellee's Brief, page 14) a Constitutional tort is not such an independent action. To state that proposition is to expose its fallacy. There can be no more uniquely Federal action than one which finds its root in the Federal Constitution.

On page 18, Appellee suggests that state court jurisdiction of a 1983 action is "clear". The Tennessee Supreme Court in deciding Chamberlain v. Brown, 223 Tenn. 25, 442 SW 2d. 248 (1969), did not see the subject with the clarity suggested in Appellee's Brief when it held that such was not the case. There are cer-

tain substantial additional problems in asking state courts, in the context of enforcing an injunctive damage cause of action arising from state statutes, to also deal with Constitutionally-based tortious conduct. It can only be speculated, but not without significance, whether the Appellee town would have objected on the grounds of relevancy and materiality if evidence had been offered in the damage hearing in the state Court to show:

A. That a Federal right existed;

B. That the actions of the town violated that right;

C. That the damages from such violations were in addition to the damages for the injunctive intrusion.

D. That experts could quantify such damage in aid of the trier of fact.

SUMMARY

On all issues presented, the Appellee has failed to counter the analysis of the Appellant and has failed to distinguish or deal with the cases cited by Appellant. The arguments which Appellee has raised are tangenital to the issues of the appeal and seek rather to "shot gun" alternative arguments in this matter.

On the briefs of the parties, and the record in this case, the majority opinion of the panel should be affirmed. This cause should be remanded for further proceeding not inconsistent with the ultimate opinion of this court sustaining jurisdiction.

Respectfully submitted,

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May 23, 1975

A. Daniel Fusaro, Clerk
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Dear Mr. Fusaro:

I enclose herewith and in four other envelopes a total of 25 copies of the Appellants' Reply Brief in the above matter.

We appologize for the form of the enclosed. We received the Appellee's Brief at 10:00 a.m. May 23, 1975. In order to meet the May 27 filing deadline with a holiday on May 26, it has been necessary to Xerox rather than print our Reply Brief.

I am sending copies of this letter and two copies of the Brief to each counsel of record.

Very truly yours,

JOHN A. BURGESS ASSOCIATES, LTD.

By: John A. Burgess

JAB/nm

Enclosures